Supreme Court, U.S.
FILED
OCT 6 2003
OFFICE OF THE CLERK

No. 03-332

IN THE

Supreme Court of the United States

JOSEPH DODGE, individually and as personal representative of the Estate of Thelma Dodge, *et al.*,
Petitioners,

v.

COTTER CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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RULE 29.6 STATEMENT

Respondent Cotter Corporation, Defendant and Appellant below, is a New Mexico corporation which is headquartered in Colorado and wholly owned by General Atomics, a privately held California corporation. No publicly traded company owns ten percent or more of the outstanding stock of General Atomics.

Exelon Corporation, a publicly traded corporation, owns Commonwealth Edison, which formerly owned Cotter Corporation. Exelon Corporation retains a financial interest in Cotter Corporation and in this litigation under the terms of Commonwealth Edison's 2000 sale of Cotter Corporation to General Atomics.

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RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Petitioners' Statement Of The Case misstates and oversimplifies the proceedings below. For example, Petitioners assert that three jury verdicts were reversed by the Tenth Circuit, each on mere "procedural bases not related to the merits." Pet. 2. This is incorrect. The first verdict was reversed because the district court misapplied collateral estoppel and therefore erroneously directed the jury to find Respondent Cotter Corporation negligent. Pet. App. 8a. This decision cannot be characterized fairly as "not related to the merits." The next two verdicts were reversed in a consolidated appeal because at both trials the district court failed utterly to perform the "gatekeeping role" set forth in

Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579 (1993). *Id.* at 31a. The Background Facts that follow show, time and again, that the district court itself questioned the reliability of Petitioners' proffered expert testimony, only to admit that testimony in the hope that the jury would sort out the issue of reliability. Although *Daubert* addresses a procedural rule, *i.e.*, Fed. R. Evid. 702, it is assuredly *not* "not related to the merits." As the Tenth Circuit correctly recognized, the improperly admitted expert evidence played a critical role in the trial and "was nothing short of essential to each of the plaintiffs' claims." *Id.* at 31a.

Petitioners make the expert testimony issue the centerpiece of their Petition. Yet Petitioners' Statement Of The Case provides no explication of the facts and proceedings giving rise to the issue. Petitioners do not explain that in the first appeal, the Tenth Circuit was so troubled by "the novelty of the medical causation theory here" and the quality of their experts' testimony, coupled with the district court's apparent failure to follow *Daubert*, that it specifically directed the district court on remand to "vigilantly make *detailed* findings to fulfill the gatekeeper role crafted in *Daubert*." *Id.* at. 23a-24a. Nor do Petitioners provide this Court with examples of the district court's rulings on key experts, which repeatedly reflect its dissatisfaction with the reliability of Petitioners' experts' testimony and its abdication of the gatekeeper function. For example, in assessing geologist Miller's testimony, the district court criticized his information concerning crucial environmental background levels of key chemicals, but let Mr. Miller testify nonetheless: "'I wish that the plaintiffs had some better information on background . . . Unfortunately,

they didn't. Now, if I don't give Mr. Miller a chance to show that this background is sufficient, basically the whole plaintiffs' case goes and we might as well just strike the trial. And I frankly don't want to do that.'" *Id.* at 22a.

As the following Background Facts reveal, Petitioners' arguments for certiorari are meritless.

BACKGROUND FACTS

1. The *Boughton* and *Dodge* Lawsuits.

In 1957, Cotter constructed a uranium mill on a site near Cañon City, Colorado (the "Mill"). Cotter began operations there the next year. *Id.* at 5a.

On September 1, 1989, approximately 532 residents of Lincoln Park, an unincorporated area approximately a mile and a half north of the Mill, sued Cotter, its parent corporation, and other defendants in the lawsuit styled *Boughton v. Cotter Corp.* ("*Boughton*"). *Id.* at 7a. The *Boughton* plaintiffs unrelated to the Petitioners here alleged negligence, trespass and nuisance related to Cotter's operation of the Mill, and also sought medical monitoring. *Id.* at 8a.

A bellwether trial with eight plaintiffs was held in January 1994. *Boughton v. Cotter Corp.*, 65 F.3d 823, 825 (10th Cir. 1995). The jury found that Cotter was negligent in all eight cases, but awarded monetary damages in only four cases, totaling $79,600, and denied medical monitoring to all

eight plaintiffs.[1] Pet. App. 9a. No non-economic or exemplary damages were awarded. *Dodge v. Cotter Corp.*, 203 F.3d 1190, 1196 n.5 (10th Cir. 2000). The remaining *Boughton* plaintiffs thereafter settled with Cotter.

Petitioners here, 47 people who also claim to have resided in or around Lincoln Park, filed *Dodge v. Cotter Corp.* ("*Dodge*") in 1991, contending that they suffered from a wide range of physical maladies allegedly caused by exposure to toxic substances that Cotter negligently released from the Mill. Pet. App. 7a-8a. Petitioners, *Dodge* plaintiffs, also asserted claims for medical monitoring and trespass. *Id.* at 8a. *Dodge* was assigned to the judge presiding over *Boughton*. Pet. 2. The judge divided the *Dodge* plaintiffs into four separate trial groups. Aplt. App. at 016810-016812, 016819-016820.

2. *Dodge I* Proceedings.

In 1998, before the first *Dodge* trial, certain *Dodge I* plaintiffs moved for partial summary judgment, contending, among other things, that Cotter should be collaterally estopped from relitigating its negligence based on the *Boughton* verdict. Pet. App. 8a. The district court granted the motion, and applied the doctrine of collateral estoppel offensively to declare Cotter negligent as a matter of law. *Id.*

In accordance with its ruling, the district court instructed the jury in the *Dodge I* trial that Cotter was negligent. *Id.* In

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1/ Three plaintiffs prevailed on nuisance claims and six succeeded on trespass claims. 203 F.3d at 1196 n.5. The plaintiffs appealed the district court's refusal to certify a class and other adverse rulings. Pet. App. 8a. The Tenth Circuit affirmed the district court on each. *Id.*

June 1998, the jury returned a verdict for the *Dodge I* plaintiffs and Cotter appealed, challenging *inter alia* the collateral estoppel ruling and the district court's decision to permit plaintiffs' expert witnesses to testify under *Daubert*. 203 F.3d at 1197, 1200 n.12.

On February 11, 2000, the Tenth Circuit reversed and remanded for a new trial holding that the district court erred by applying collateral estoppel. Pet. App. 8a. The Tenth Circuit explained that, "[i]f *Boughton I* was to have been the test case in plaintiffs' effort to establish this toxic tort, greater care to assure the jury was properly instructed and the verdict forms were clear was essential to establish results impervious to relitigation." 203 F.3d at 1200.

The Tenth Circuit also addressed the district court's admission of plaintiffs' expert testimony, noting that,

> because the question of expert testimony is likely to recur, we would be remiss not to indicate our concern that the district court vigilantly make detailed findings to fulfill the gatekeeper role crafted in *Daubert* . . . Given the novelty of the medical causation theory here . . . it is essential that by specific findings of record the trial court assures the expert testimony . . . is relevant and reliable, and the 'particular opinion is based on valid reasoning and reliable methodology.'

Id. at 1200 n.12.

3. *Dodge II* Proceedings.

The next group of Petitioners, the *Dodge II* plaintiffs, was set for trial in October 2000, eight months after the Tenth Circuit's admonition requiring "detailed findings to fulfill the gatekeeper role." Pet. App. 8a.

a. The Petitioners' Expert Testimony.

The *Dodge II* plaintiffs offered as expert witnesses Mr. Glen Miller, Dr. Malin Dollinger, and Dr. Martyn Smith to opine on both exposure and causation. Pet. App. 20a-21a. The plaintiffs offered no evidence of exposure or causation other than the testimony of those three witnesses.[2]

i. Mr. Miller's Testimony.

Plaintiffs sought to admit the testimony of geologist Glen Miller to establish that the *Dodge II* plaintiffs' properties were contaminated by the presence of harmful substances derived from Cotter's mill, including uranium, molybdenum, arsenic, and lead. Pet. App. 20a. In reaching his conclusion that these substances emanated from Cotter's mill, Mr. Miller opined that the levels of those substances in soil, water and vegetation taken from some of the plaintiffs' properties far exceeded the baseline. *Id.* at 21a.

Mr. Miller, however, selected a world-wide average baseline, rather than baseline levels specific to the mineral

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2/ Dr. Michael Kelly testified on appropriate medical monitoring protocols. Dr. Kelly's testimony was premised, however, on Mr. Miller's opinion of exposure and on Dr. Dollinger's opinion of causation. Aplt. App. at 021723:4-5; 021778:23-25; 021783:5-21; 021786:9-15; 021722:19-021723:5; 021728:23-25; 021802:11-25; 021807:14-20.

rich State of Colorado or the uranium-rich area surrounding the Cotter mill (which is, of course, one reason why the mill was placed at that site).[3] *Id.* Mr. Miller's selected baseline derived from a 1966 English textbook ("*Bowen*") which established average baseline levels of such substances worldwide, rather than in any particular region. *Id.* Thus, *Bowen* consolidates and averages the level of the relevant substances from such far-flung regions as Great Britain, New Zealand, and sections of Africa.[4] *Id.* at 21a-22a.

At trial, two of Cotter's experts, both professors of geology at the Colorado School of Mines, testified that using a global average as a baseline is a scientifically unsound methodology. *See* Aplt. App. at 014194:20-014195:8; 015488:1-14; 015469:5-14; 026211:12-026212:1; 026353:15-026354:11. For example, samples collected by the United States Geological Survey from the groundwater in the Cañon City area over several decades averaged 100 times the world-wide baseline. *Id.* at 014224:2-10; 014226:13-014227:8; 020113:19-020114:13; 020124:25-020126:1.

ii. Dr. Dollinger's Testimony.

Relying on Mr. Miller's testimony, Dr. Dollinger would opine not only that the *Dodge II* plaintiffs were "substantially exposed" to toxic substances but also that their subsequent

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3/ This was Miller's first attempt to assess whether an industrial facility contaminated a community above natural baseline levels. Aplt. App. at 012110:22-012111:1; 020117:7-16.

4/ Miller also relied upon a single vegetation baseline, rather than one specific to the particular vegetation he was sampling. Aplt. App. at 012011:13-17; 012068:7-9; 020083:3-13; 030646; 030648; 030650.

illnesses must have derived from the exposure. *Id.* at 011541:13-011542:3; 012228:12-17; 011534:1-7. Dr. Dollinger, an oncologist, asserted that the alleged exposure (for which he could not establish a dose or exposure amount) caused such conditions as arthritis, general aches and pains, and endometriosis. *Id.* at 021038:13-19; 020949:7-020951:8; 020952:6-020957:3; 021044:13-17; 020861:17-020862:4; 020868:8-17; 011686:8-15. He could not, however, identify a single literary source (medical or scientific) linking exposure (in any amount) to these illnesses. *Id.* at 011775:1-8. Instead, Dr. Dollinger relied upon three articles:

(i) the "Walravens" study, the author of which testified for Cotter that his research had determined there was ***no*** link between molybdenum exposure and adverse health effects;

(ii) a 1961 Armenian study that the National Academy of Sciences had labeled speculative; and

(iii) a case report that Dr. Dollinger admitted he had not actually reviewed.

Id. at 011780:9-24.

iii. Dr. Smith's Testimony.

The *Dodge II* plaintiffs also sought to admit the testimony of Dr. Smith, a toxicologist, to establish a connection between the alleged exposure and the plaintiffs' alleged injuries and illnesses. Pet. App. 20a-21a. As with Dr. Dollinger, Dr. Smith relied on Miller's findings to conclude that plaintiffs were significantly exposed, even though Dr. Smith acknowledged that he did not know how much molybdenum was ingested, inhaled, or otherwise

absorbed into any of the plaintiffs' bodies. *Id.* at 011541:13-011542:3; 012228:12-17; 012189:10-15, 012256:10-24.

Dr. Smith reasoned that because the plaintiffs had conditions which he concluded may be caused by exposure to toxic substances, those conditions must have been caused by such exposure. Accordingly, Dr. Smith attributed such diverse ailments as infertility[5], "thermal stress," memory loss, migraine headaches, fatigue, diarrhea, bony exostoses, and joint deterioration to the plaintiffs' exposure. *Id.* at 012249:10-15; 012221:8-13, 012184:14-012188:16. In addition to his own purported research,[6] Dr. Smith relied upon the same three articles as Dr. Dollinger. *Id.* at 012280:20-012285:20; 011780:9-24.

b. *Daubert* Motion Proceedings Before The District Court.

Cotter moved to exclude six of the plaintiffs' proposed experts, including Mr. Miller, Dr. Dollinger, and Dr. Smith, on the grounds that their testimony was unreliable and inadmissible under *Daubert*. Pet. App. 9a.

5/ Dr. Smith admitted that "There have been very few studies on the effects of molybdenum on human beings, and I don't recall any that report a fertility problem in males." Aplt. App. at 012218:9-012219:5.

6/ Dr. Smith's research a study of the effect of molybdenum in mice did not support his testimony. Although he testified that harmful effects begin after exposure to 1,000 micrograms of molybdenum, his research involved giving mice the human equivalent of 14,000,000 micrograms of molybdenum. Even at that level, his research netted inconclusive results as to whether humans would experience adverse effects from such exposure. Aplt. App. at 012286:5-23.

In support of the motion, Cotter filed a forty-seven page brief and an appendix of several thousand pages of reports and articles. *Id.* at 19a. The district court rejected Cotter's motion, and instead limited Cotter to a brief of twenty pages with no more than twenty pages of exhibits. *Id.* at 29a. The district court denied a subsequent motion by Cotter for leave to file a lengthier appendix "finding that 'such material is prolix,'" and that twenty pages was "'sufficient.'" *Id.* at 19a.

At Cotter's request, the district court agreed to hold a *Daubert* hearing. *Id.* at 29a. Before the hearing, the district court informed the parties that its rulings "'are going to be very similar, if not the same, as [the *Dodge I*] rulings . . . except in the areas where the Court of Appeals [found] error.'" *Id.* at 19a-20a.

Consistent with its stated intention to admit the experts and limit its review of briefing and written materials, the district court refused to allow any live witness testimony at the *Daubert* hearing, over Cotter's objection. *Id.* at 20a. Instead, the district court questioned counsel, often with questions that were better answered by the experts themselves. *Id.*

At the hearing, the district court specifically professed its skepticism of the reliability of the proffered testimony, particularly the methodology employed by Miller, whose opinions undergird those of Drs. Dollinger and Smith:

> 'Let me just be very candid with you. I wish that the plaintiffs had some better information on background. I think it would be much better if they had; if they had even gone out and done some tests

> in the surrounding areas, rather than rely on Bowen. What is the level in Europe or Israel or South Africa, it seems to me is not that critical.
>
> Unfortunately, they didn't. Now, if I don't give Mr. Miller a chance to show that this background is sufficient, basically the whole plaintiffs' case goes and we might as well just strike the trial. And I frankly don't want to do that. I think the plaintiffs should have some opportunity to present their case to the jury.'

Id. at 22a.

The district court reserved ruling on admission until trial. *Id.* at 22a-23a. With the exception of its criticism of Miller's methodology, the court made no specific, detailed findings on the reliability of the experts' testimony. *Id.* at 22a-23a.

At trial, with the jury already empaneled, the district court held an in camera voir dire for each contested expert. *Id.* at 23a. The court admitted the experts' testimony, but failed to make any specific findings as to the reliability of their methodology or conclusions. *Id.* at 24a. Instead, the court focused solely on the credentials of the proffered experts. *Id.* at 27a.

Regarding Mr. Miller, the court stated: "'There certainly are problems here, a lot of problems, concerning water, concerning vegetation, and the differences. But what I have heard is that Mr. Miller is certainly a well-qualified geologist, got his degree in Wyoming, has a great deal of experience.'" *Id.* at 24a. After referencing the studies Miller relied upon

the district court concluded that, "'I think that the problems that exist with differences can be covered by cross-examination.'"[7] *Id.* at 25a.

In admitting the testimony of Dr. Dollinger the court again focused upon the credentials of the proffered expert, referencing Dr. Dollinger's "'very fine education . . . and other excellent background,'" that "'he treats patients with cancer and other diseases'" and had "'reviewed medical literature'" related to causation. That Dr. Dollinger expressed a "'minority view . . . does not mean that he is not qualified as an expert.'" *Id.* at 26a.

Finally, the district court recited Dr. Smith's methodology, but made no specific findings as to its reliability. Dr. Smith was admitted because

> 'there has been a showing that he is undisputably an expert in the area of toxicology. It's been indicated that his methodology is the same as the methodology that is used in nonlitigation cases . . . He has apparently done research, himself, on heavy metals. He teaches doctors about toxicology, and the plaintiff is conceding that there is no study in risk exposure . . . So the Court will overrule the objections, the *Daubert* objections as to Dr. Smith, and we'll see how it goes.'

Id. at 28a.

7/ Because Miller had no baseline level for dust exposure whatsoever, the court stated that he may not testify concerning dust. Pet. App. 25a.

c. *Dodge II* Verdict And Appeal.

The *Dodge II* jury found that Cotter was negligent but that Cotter had not caused any of the Plaintiffs' alleged physical injuries and illnesses. *Id.* at 9a. The district court accordingly entered judgment for Cotter on the negligence claims. *Id.* Separately, the jury returned a verdict for ten plaintiffs on the issue of medical monitoring and for eleven plaintiffs on the trespass issue (awarding $42,501 total on the trespass claims). *Id.* Notwithstanding the jury's verdict, the district court, acting *sua sponte*, entered judgment on medical monitoring for ***all*** plaintiffs, and assessed monitoring of $241,300 (with interest, the total award was approximately $300,000). *Id.*

Cotter appealed to the Tenth Circuit, arguing that the district court failed to perform its gatekeeper function as required by *Daubert* and erred in admitting the expert testimony, among other contentions. *Id.* Cotter requested, and obtained, a stay of the appeal pending resolution of *Dodge III*. *Id.* at 56a-57a.

4. *Dodge III* Proceedings.

In May 2001, the district court, over Cotter's objection, consolidated the remaining groups of *Dodge* plaintiffs, including the plaintiffs from *Dodge I*, whose case the Tenth Circuit had remanded for retrial. *Id.* at 10a.

In advance of this final trial, the district court granted the *Dodge III* plaintiffs' motion for offensive collateral estoppel on the issue of negligence. *Id.* Relying upon the jury verdict in *Dodge II*, the district court again instructed the jury that Cotter was negligent as a matter of law. *Id.* at 32a.

With one exception, each of the experts testifying for plaintiffs in *Dodge III* had testified in *Dodge II*. *Id.* at 10a. Accordingly, the district denied Cotter's motion for a *Daubert* hearing, except for the newly introduced expert, Dr. Harry Demopoulos. Aplt. App. at 019027; 020186. At the *Daubert* hearing, the court again heard only from counsel. *Id.* at 021319:19-021340:10. Over Cotter's objection, all of the experts were permitted to testify at the *Dodge III* trial. Pet. App. 32a-33a.

The *Dodge III* jury, unlike the *Dodge II* jury, found that Cotter's negligence had caused plaintiffs' injuries and returned verdicts in favor of all but one plaintiff on the negligence claim, in favor of 13 plaintiffs on the trespass claims and in favor of 27 plaintiffs for negligence requiring medical monitoring. *Id.* at 10a. The jury also awarded 26 plaintiffs punitive damages. *Id.*

The district court issued a judgment on July 6, 2001, which left open the amounts for medical monitoring and costs, and the assessment of prejudgment interest. Aplt. Att. O. The district court invited briefing on those issues. *Id.* On September 10, 2001, the district court denied Cotter's post-trial motions and determined the awards for costs and medical monitoring. Aplt. Att. S, T. The court entered those awards in a November 20, 2001 judgment, wherein the court also established the total prejudgment interest. Aplt. Att. U. The district court expressly referred to the November 20, 2001 judgment as setting the time for Cotter to appeal. *Id.* Cotter appealed the verdict, again citing the district court's failure to fulfill its gatekeeper function under *Daubert*. Aplt. Att. V. Thus the stage was set for consolidation and resolution of the *Dodge II* and *Dodge III* appeals.

REASONS FOR DENYING THE PETITION

I. The Tenth Circuit's Standard Of Review Creates Neither An Issue Of National Importance Nor A Significant Legal Question.

The procedural history of this case makes it unique. Concerned about "'the novelty of [Petitioners'] medical causation theory here,'" Pet. App. 24a., and the district court's failure in the first trial to make any express findings reflecting the reliability of plaintiffs' proffered expert testimony, the Tenth Circuit specifically directed the district court on remand to "vigilantly make detailed findings to fulfill the gatekeeper role crafted in *Daubert*." *Id.* at 23a-24a. The district court then conducted two trials for separate groups of Petitioners, but when those judgments came up for appellate review, the Tenth Circuit searched both records in vain for the detailed findings concerning reliability that it had directed the district court to make:

> Upon reviewing the record, we reluctantly conclude that the district court did not perform its gatekeeper function with respect to plaintiffs' experts Mr. Miller, Dr. Dollinger and Dr. Smith and thereby abused its discretion by admitting their testimony. Faced with an exceedingly difficult, complex case and obvious docket pressures, the court did not make adequate findings on the record to assure that the expert testimony offered was both relevant and reliable, and that the particular opinions were based on valid reasoning and reliable methodology.

Id. at 23a.

There is nothing remarkable about this ruling. This Court has repeatedly emphasized that a district court has an obligation to exercise its gatekeeper function. *See Daubert*, 509 U.S. at 589, 597; *General Electric Co. v. Joiner*, 522 U.S. at 136, 142 (1997), *Kumho Tire Co., Ltd v. Carmichael*, 526 U.S. 137 (1999). Performance of this gatekeeper function is mandatory, not discretionary. *Daubert* held that, when

> [f]aced with a proffer of expert scientific testimony, then, the trial judge *must* determine at the outset . . . whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue. This entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether [it] can be applied to the facts in issue.

509 U.S. at 592 (emphasis added). Although the district court has "latitude" in "*how* to test an expert's reliability, and to decide whether or when special briefing or other proceedings are needed to investigate reliability," *Kumho Tire*, 526 U.S. at 152, performing this function remains an "obligation." *Id.* at 141. As three members of this Court noted, *Kumho Tire* "makes clear that the discretion it endorses trial-court discretion in choosing the manner of testing expert reliability is not discretion to abandon the gatekeeping function." *Id.* at 158-59 (Scalia, J., concurring).

Petitioners attempt to create an issue worthy of certiorari by pointing to what they call the Tenth Circuit's "hybrid de novo" standard of review for *Daubert* rulings. Pet. 5. True,

the Tenth Circuit does "review de novo the question of whether the district court applied the proper standard and actually performed its gatekeeper role in the first instance." Pet. App. 17a. But this is unremarkable; surely if a district court were to apply the old standard of *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923), for example, that court's ruling would be reversed for legal error.[8] Not one of the cases Plaintiffs collect as evidence of a conflict take issue with the notion that application of an improper standard constitutes an error of law. Pet. 8-13 n.10.

Beyond that, the Tenth Circuit "review[s] the trial court's actual application of the standard in deciding whether to admit or exclude an expert's testimony for abuse of discretion." Pet. App. at 17a. Significantly, a review of the Tenth Circuit's opinion establishes beyond question that it resolved this case on the abuse of discretion standard. Nowhere in its opinion does the Tenth Circuit specify an error of law by the district court. Throughout its opinion, however, the Tenth Circuit highlights the abuses of discretion that caused it to reverse and remand. As to the *Dodge II* appeal, the Tenth Circuit stated: "Upon reviewing the record, we reluctantly conclude that the district court did not perform its gatekeeper function with respect to plaintiffs' experts Mr. Miller, Dr. Dollinger and Dr. Smith *and thereby abused its discretion by admitting their testimony*." *Id.* at 23a (emphasis added). The Tenth Circuit then supports that conclusion by going through the district court's rulings for each witness and explaining how each such ruling fails to

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8/ The distinction is semantic, in any event. A district court has no discretion to apply incorrect law, so legal errors constitute abuses of discretion.

address the crucial *Daubert* issue of the reliability of the proffered expert testimony. *Id.* at 23a-28a.

Plaintiffs also contend that the Tenth Circuit conducted "a de novo review of the trial court's lengthy *Daubert* procedures." Pet. 6. This too is incorrect. The Tenth Circuit noted "that a district court exercises significant discretion in deciding how to perform its gatekeeper role." Pet. App. 29a. The Tenth Circuit noted also that "a district court has discretion to limit the information upon which it will decide the *Daubert* issue," and recognized that it "review[s] the exercise of that discretion for its abuse." *Id.*

The Tenth Circuit then carefully reviewed the manner in which the district court exercised its discretion in how to conduct its role as gatekeeper, by: rejecting complete submissions and expert reports; limiting the length of any *Daubert* brief and appendix to 20 pages; refusing to take live testimony from the experts themselves; holding only a brief non-testimonial hearing and asking the lawyers questions only the experts could answer; and truncating the voir dire of the experts at trial. *Id.* at 29a-30a. Recognizing that any one of these limitations might be acceptable under certain circumstances, the Tenth Circuit stated: "taken together, these decisions placed an unreasonable limitation on the information available to the court and in our view exceeded the bounds of permissible choice." *Id.* at 30a. Ultimately, the Tenth Circuit concluded that the district court's inadequate findings on the crucial issue of reliability precluded it from concluding that the district court acted within its discretion in limiting the *Daubert* proofs: "we do not have before us the findings required to determine definitely if the court abused its discretion by so limiting the

evidence. However, from the record we do have before us, taken as a whole, *we would be inclined to conclude that the district court did abuse its discretion*." *Id.* at 30a-31a (emphasis added). Thus, despite Plaintiffs' contention to the contrary, this was not de novo review.

Finally, the Tenth Circuit addressed the issue of the expert witnesses at the *Dodge III* trial. *Id.* at 32a-33a. The district court had refused to hold new hearings in *Dodge III* on the experts who had testified in *Dodge II*. *Id.* Hence the Tenth Circuit ruled that, "for the reasons discussed at length above, *we conclude that the district court abused its discretion* in *Dodge III* by admitting the testimony of Mr. Miller, Dr. Dollinger and Dr. Smith." *Id.* at 33a (emphasis added).

Beyond question, the Tenth Circuit reviewed the district court's *Daubert* rulings for abuse of discretion. That the Tenth Circuit held the district court abused its discretion is no basis for certiorari.

II. The Tenth Circuit's Exercise Of Its Discretion To Remedy The District Court's Error Was Specific To This Case And Invokes No Issues Of National Significance.

Petitioners' second question, which asks this Court to review the particular remedy adopted by the Tenth Circuit in this case, i.e., that of a new trial, does not warrant certiorari. *Id.* at 31a. Petitioners' attempt to spin the case-specific remedy into a broad principle or a conflict with other circuits is without merit.

The Tenth Circuit's decision to remand for a new trial was set against the backdrop of the particular circumstances of this case. Recognizing that "the testimony of these experts was nothing short of essential to each of the plaintiffs' claims," *id.*, a fact that Petitioners do not dispute, the Court found that the decision to admit this expert testimony without employing the necessary gatekeeper function could not be harmless error. *Id.*

The district court also recognized that this expert testimony was essential to plaintiffs' claims. Indeed, that very fact motivated its erroneous ruling in the first place:

> 'I wish that the plaintiffs had some better information on background . . . Unfortunately they didn't. Now, if I don't give Mr. Miller a chance to show that this background is sufficient, basically the whole plaintiffs' case goes and we might as well just strike the trial. And I frankly don't want to do that.'

Id. at 22a. In light of this ruling, the argument that this Court should grant certiorari to compel the Tenth Circuit to give the district court a chance to create a post hoc justification for its ruling is frivolous.[9]

The Tenth Circuit was mindful of the effect a new trial would have on judicial resources: "Given the vast investment of resources in this case by both parties and by the federal judiciary, we are reluctant to render a decision that will

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9/ As Petitioners note, Pet. 14 n.12, the trial judge has recused herself from this case, which is now on a different judge's docket, making the relief requested by Petitioners impractical as well as improper.

further delay a final resolution." *Id.* at 31a. But the appellate court decided that the temptation to justify admitting this expert testimony outweighed, at least in this case, the appellate court's concern for judicial economy. "[W]e think no district court would be well positioned to make valid findings given the overwhelming temptation to engage in post hoc rationalization of admitting the experts." *Id.* The court responsibly recognized, as a sister circuit had held, that "'[a] post-verdict analysis does not protect the purity of the trial, but instead creates an undue risk of post-hoc rationalization. This is hardly the gatekeeping role the Court envisioned in *Daubert* and its progeny.'" *Id.* at 32a, citing *Mukhtar v. California State Univ.*, 319 F.3d 1073, 1074 (9th Cir. 2003), *amending* 299 F.3d 1053, 1066 (9th Cir. 2002).

Congress has endowed the appellate courts with broad discretion to fashion a remedy as justice requires under the particular circumstances of each individual case.

> The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had ***as may be just under the circumstances***.

28 U.S.C. § 2106 (West 2003) (emphasis added). The Tenth Circuit properly exercised this discretion in refusing to permit a post-trial application of the gatekeeper function.

Furthermore, the Tenth Circuit's exercise of discretion in this particular case creates no conflict among the circuits. *See* Pet. at i,15. Petitioners do not cite a single *Daubert*-

related case, let alone one so factually identical as to conflict with the Tenth Circuit's case-specific remedy. Instead, Petitioners cite one case noteworthy for the complete absence of an underlying trial[10] and another in which the appellate court remanded to the Department of Agriculture where the agency had not fully articulated its standard for interpreting the relevant act.[11] *Id.* at 15. Neither case involved the particular concerns that motivated the Tenth Circuit's choice of remedy here. Hence, there is no reason for this Court to review that choice of remedy.

III. Petitioners' Jurisdictional Argument Is Predicated On Omissions Of Key Facts And A Misstatement Of The Tenth Circuit's Holding.

A. Petitioners Ignore That The July 6, 2001 Judgment Did Not Set The Amount Of Costs Or Medical Monitoring.

Petitioners premise their jurisdictional argument on the assertion that the district court's July 6, 2001 Judgment left only the calculation of pre- and post-judgment interest for future resolution (and thus was final and appealable). *Id.* at 18-21. This assertion is simply untrue.

In its July 6 Judgment, the district court awarded not only interest, but also medical monitorings and costs two

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10/ *Fort Knox Music Inc. v. Baptiste*, 203 F.3d 193, 196 (2d Cir. 2000) (appeal from judgment on the pleadings).

11/ *Norinsberg v. United States Dept. of Agric.*, 162 F.3d 1194, 1996 (D.C. Cir. 1998) (remanding for articulation of "factors relevant in interpreting 'actively involved'" as used in the Agricultural Commodities Act, 7 U.S.C. § 499a(b)(9)).

matters Petitioners wholly omit from their recitation of the procedural history. *See Id.* at 18, Pet. App. 63a. The July 6 Judgment expressly directed plaintiffs to file a Bill of Costs and to brief the issue of medical monitoring. Pet. App. 63a. Unlike the prejudgment interest, the amounts of costs and of medical monitoring were not calculable based on any statutory rate or formula. Rather, the final amount awarded on each was left to the discretion of the district court. Aplt. Att. P. at 3. Indeed, assessing those amounts was no mere ministerial task the parties hotly contested the amount of the awards, whether medical monitoring awards should be put into a trust or given directly to Petitioners, and whether Petitioners were entitled to have attorney's fees paid from the awards.

The district court's July 6 Judgment was not a final judgment for purposes of Rule 58 because the court left the remedy partially undetermined upon its entry. *See Liberty Mut. Ins. Co. v. Wetzel*, 424 U.S. 737, 744 (1976) (summary judgment order which did not assess damages or other relief was not final). As Judge Friendly wrote, an order "adjudging liability but leaving the quantum of relief still to be determined has been a classic example of non-finality and non-appealability from the time of Chief Justice Marshall to our own." *Taylor v. Board of Educ.*, 288 F.2d 600, 602 (2d Cir. 1961).

In fact, the district court did not actually enter judgment on specific amounts for costs or medical monitoring until the November 20, 2001 Judgment from which Respondent appealed. On August 6, 2001, as requested by the district court, both parties filed briefs addressing the issue of costs and medical monitoring. On September 10, 2001, the district

court entered an order that determined the amounts to be awarded for costs and for medical monitoring, and further stated that because the "'only remaining issue before the Court concerns interest,' it would 'amend the judgment to reflect the award of costs and medical monitoring ***once the parties have submitted their calculations concerning interest on the personal injury and trespass awards.***'" Pet. App. 12a (quoting district court's September 10, 2001 Order) (emphasis added)). Thus, the district court expressly left the actual entry of final judgment on medical monitoring and costs until it affixed the prejudgment interest.[12]

On November 20, 2001, the district court entered a final judgment that disposed of all outstanding issues, including amounts awarded in prejudgment interest, medical monitoring, and costs. Aplt. App. U. The district court clearly intended this to be the final appealable judgment, as it stated that "the execution of the judgment in this case is stayed until defendant's time for filing an appeal has expired (that is, 30 days from the date of **this** Final Judgment)." Pet. App. 73a (emphasis added).

12/ The September 10 order did not constitute the final judgment and Petitioners do not contend otherwise. That order did not comply with the requirements for a judgment as set forth in Fed. R. Civ. P. 58: "Every judgment . . . must be set forth on a separate document." Fed. R. Civ. P. 58(a). A judgment is effective only when so set forth and when entered as provided in Rule 79(a). *Id.* at 58(b)(2). That order determined the amounts Petitioners were entitled to recover on their medical monitoring claims, only after discussing the parties' competing legal arguments. Aplt. Att. T. Not until November 20, 2001, did the district court enter a judgment that satisfied the separate document requirements of Rule 58.

B. Petitioners Misstate The Tenth Circuit's Holding.

Petitioners premise their request for certiorari on this issue upon the Tenth Circuit's supposed divergence from the Fourth and Sixth Circuits, characterizing the Tenth Circuit's rejection of their argument as based solely upon the prejudgment interest awarded but not calculated in the July 6, 2001 Judgment. But to make this argument, Petitioners must and do omit language from the Court's opinion that is contrary to their presentation of the facts and their characterization of the appellate court's opinion. Petitioners strategically place an ellipsis on line 6 of their block quote. Pet. 19. Re-inserting the omitted language, however, reveals that the appellate court clearly relied upon more than the uncalculated prejudgment interest in determining that the July 6, 2001 Judgment was not a final and appealable order. With the omitted language emphasized, the section of the Tenth Circuit's opinion relied upon by Petitioners reads:

> Here, a final judgment was not entered until November 20, when the district court set forth a sum certain for every part of the award, including prejudgment interest. It is clear that the July 6 directive, although titled a "Judgment," was not a final decision under § 1291 ***because neither the medical monitoring award nor the prejudgment interest were finally determined.*** Prejudgment interest is a portion of the damages and thus is an integral part of the merits decision. *Osterneck v. Ernst & Whinney*, 489 U.S. 169, 175-76 & n. 3, 109 S. CT. 987, 103 L. Ed. 2d 146 (1989); *Garcia v. Burlington N.R. Co.*, 818 F.2d 713, 721 (10th Cir.

> 1987). Here, the determination of prejudgment interest was pending until November 20, which is the date the decision in this case became final. Accordingly, Cotter's notice of appeal was timely and we therefore have appellate jurisdiction.

Pet. App. 13a-14a.

Petitioners' contention that the Tenth Circuit made its decision based solely upon the outstanding prejudgment interest is patently incorrect. Petitioners' circuit split is pure fiction. There is no basis for a grant of certiorari here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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October 6, 2003